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ARTICLES

ACCOMMODATING INDIAN RELIGIONS: THE PROPOSED 1993 AMENDMENT TO THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT

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INTRODUCTION

In two cases decided in 1988 and 1990, *Lyng v. Northwest Indian Cemetery Protective Ass'n*[1] and *Employment Division of Oregon v. Smith*,[2] the United States Supreme Court severely restricted the protective scope of the free exercise clause of the First Amendment to the United States Constitution.[3] In *Lyng* and *Smith*, the Court overruled more than twenty-five years of precedent by holding that government action that creates an incidental burden on the free exercise of religion need not be justified by a "compelling state interest" which cannot be served by less restrictive means.[4] Indeed, after *Lyng* and *Smith*, religious claimants

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1. 485 U.S. 439 (1988).

2. 494 U.S. 872 (1990).

3. In part, the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

4. 485 U.S. at 452-53; 494 U.S. at 886 n.3. Since the early 1960s, the United States Supreme Court has held that the free exercise clause mandates that religious practices incidentally burdened by government agents must be justified by a compelling state interest. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (holding state laws burdening religions "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest"); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (holding "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (stating that the question is "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right"). Even when a compelling government interest is present, the Supreme Court has ruled that the regulation

must prove that government actors intended to punish the claimants' particular religions—a virtually impossible standard to meet—in order to invoke the protections of the free exercise clause. In addition, in the 1987 case of *O'Lone v. Estate of Shabazz*,[5] the Court similarly restricted the free exercise clause as it applies to prisoners, essentially leaving prisoners' religious rights to the unfettered discretion of prison officials.

The Court's recent restriction of First Amendment protection is unfortunate, since the compelling interest test has been essential to the continued existence of often unorthodox or unpopular "minority religions." Government policies are commonly insensitive or hostile to these faiths, and have occasionally been overruled in the courts.[6] For instance, in 1963, the Supreme Court in *Sherbert v. Verner*[7] held that a Seventh Day Adventist could not be denied unemployment benefits after being fired for a religiously-motivated refusal to work on Saturdays, since the state could not justify its action with a compelling interest.[8] Additionally, in 1972, the Court held in *Wisconsin v. Yoder*[9] that a group of Amish children, whose parents' religious beliefs were incompatible with formal secondary education, should be exempted from state compulsory education laws because of the absence of a compelling state interest.[10]

Similarly, Native American[11] religious groups,[12] as minority re-

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on religious conduct must be the least restrictive alternative to achieve that interest. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 654-56 (1981); Thomas v. Review Bd. of Indiana, 450 U.S. 707, 718 (1981).

5. 482 U.S. 342 (1987).

6. The Court in *Smith* recognized this, noting that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . ." *Smith*, 494 U.S. at 890. One commentator has written that "[t]he smaller and more unconventional the religion, the more likely it is that some statute or administrative rule will interfere seriously with that religion, either by accident or design. If anything, small insular sects need the protection of religious exemptions more than well-known, traditional religions." David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77, 101 (1991).

7. 374 U.S. 398 (1963).

8. *See also Thomas*, 450 U.S. at 718 (holding that the state could not deny unemployment benefits to a Jehovah's Witness who quit weapons manufacturing job because of religious beliefs).

9. 406 U.S. 205 (1972).

10. *Id.* at 214-15.

11. The terms "Indian" and "Native American" are used interchangeably in this article. Generally, in federal Indian law, the definition of an Indian varies from statute to statute. Some federal statutes defer to tribal determinations of membership. *See, e.g.*, 25 U.S.C. § 450b(d) (1988) (defining Indian in the Indian Self-Determination and Education Assistance Act of 1975 as "a person who is a member of an Indian tribe"). Others impose additional requirements such as blood quanta or dispense with the requirement of tribal membership altogether. *See, e.g.*, 25 U.S.C. § 479 (1988) (defining Indian under the Indian Reorganization Act to include "all persons of Indian descent who are members of any recog-

ligions without an effective voice in the American political process,[13] must rely almost exclusively on the free exercise clause for protection of their religious rights, since federal statutes (such as the American Indian Religious Freedom Act of 1978 ("AIRFA"))[14] designed to accommodate Indian religions have not proven adequate. Thus, the evisceration of the free exercise clause in *Lyng*,[15]

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nized Indian tribe . . . [and] all other persons of one-half or more Indian blood"); 18 U.S.C. §§ 1152-53 (1988) and 25 U.S.C. § 13 (1976) (federal statutes dealing with criminal jurisdiction and social services programs, respectively, which use the term Indian without specifically limiting it to tribal members). *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 19-27 (Rennard Strickland et al. eds., 1982) (discussing definition of Indian).

The proposed 1993 amendment discussed in this article defines an Indian as "an individual of aboriginal ancestry who is a member of an Indian tribe or any individual who is an Alaska Native." In addition, the amendment has a special definition for California Indians. AMERICAN INDIAN RELIGIOUS FREEDOM RESOLUTION (DISCUSSION DRAFT) 2-3 (on file at Native American Rights Fund) [hereinafter DISCUSSION DRAFT].

12. For general information about traditional Native American religions, see generally JOSEPH E. BROWN, THE SPIRITUAL LEGACY OF THE AMERICAN INDIAN (1982); AKE HULTKRANTZ, THE RELIGIONS OF THE AMERICAN INDIANS (1979); SEEING WITH A NATIVE EYE (Walter H. Capps ed., 1976); TEACHINGS FROM THE AMERICAN EARTH (Dennis Tedlock & Barbara Tedlock eds., 1975); VINE DELORIA, GOD IS RED (1973).

Although substantial differences exist between the various tribal religions, some generalizations about traditional Native American religions are possible. First, traditional Native American religions are pervasive, giving all aspects of Indian life a spiritual significance. *See, e.g.*, 25 U.S.C. § 1302 (1988) (the Indian Civil Rights Act, while imposing most of the provisions of the Bill of Rights upon tribes, makes an exception for the Establishment Clause due to a conscious recognition that government and religion are inextricably interwoven in some tribes); BROWN, *supra*, at 69:

> What we refer to as religion cannot, in the case of the American Indian, be separated from the forms and dynamics of everyday life, or from almost any facet of the total culture; nor, as we shall see more clearly, may there be separation from the phenomena of the natural environment.

Second, Native American religions differ profoundly from most major world religions in their attitudes toward history. Most major world religions are "commemorative" as a substantial portion of their religion deals with commemorating sacred events of the past. FEDERAL AGENCIES TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 8 (1979) [hereinafter AIRFA REPORT]. Native American religions, however, are "continuing" as their ceremonies and rituals deal with the ongoing interaction between the tribe and the natural world it inhabits. AIRFA REPORT, *supra*, at 10. Finally, Native American religions are fundamentally inconsistent with at least one major world religion, Christianity, in their conceptualization of the relationship between mankind and the environment. Native American religions have a more profound appreciation of the interdependence of all living things. Further, Indian rituals and ceremonies are seen as necessary to ensure the continuing health of "Mother Earth." F. Scott Momaday, NATIVE AMERICAN ATTITUDES TO THE ENVIRONMENT, in SEEING WITH A NATIVE EYE, *supra* note 12; HULTKRANTZ, *supra*, at 44, 104-05. In contrast, Christianity generally distinguishes between mankind and the natural environment. For example, *Genesis* 1:26-28 states that man should "have dominion over" and "subdue" the earth. *See* DELORIA, *supra*, at 91-109.

13. Native Americans make up less than one half of one percent of the total United States population. DAVID H. GETCHES & CHARLES F. WILKINSON, FEDERAL INDIAN LAW 6 (2d ed. 1986) (based on 1980 census).

14. 42 U.S.C. § 1996 (1988).

15. 485 U.S. 439 (1988).

Smith,[16] and *O'Lone*[17] leaves Native American religious practices especially vulnerable to insensitive government officials.

In response to *Lyng*, *Smith*, and *O'Lone*, an amendment to the AIRFA is expected to be proposed in early 1993 to provide additional protection for Native American sacred sites, the sacramental use of peyote by members of the Native American Church, the religious use of eagle parts and feathers by Native Americans, and the religious rights of Native American prisoners.[18] This amendment will be the fifth attempt to strengthen the AIRFA in as many years[19] and has strong support from Indian tribes[20] and other groups.[21] The proposed amendment, however, is expected to

16. 494 U.S. 872 (1990).

17. 482 U.S. 342 (1987).

18. The American Indian Religious Freedom Resolution (the proposed amendment) has four titles. Title I, designed to protect sacred sites, reinstates the compelling interest test whenever a governmental action "is posing or will pose a substantial and realistic threat of undermining or frustrating a Native American religion" and requires notice and consultation with appropriate Indian tribes and traditional leaders before a federal or federally-assisted undertaking which may change the character or use of a sacred site may continue. DISCUSSION DRAFT, *supra* note 11, at 8-23. Title II creates a legislative exemption to all federal, state and local laws proscribing the use, possession, or transportation of peyote to be used sacramentally by Native Americans. DISCUSSION DRAFT, *supra* note 11, at 23-26. Title III provides that Native American prisoners who practice a Native American religion shall have access comparable to the access afforded prisoners who practice Judeo-Christian religions to their Native American traditional religious leaders, to items and materials used in religious ceremonies, and to Native American religious facilities. DISCUSSION DRAFT, *supra* note 11, at 26-27. In addition, title III instructs the Attorney General to establish a Commission to investigate the conditions of Native American prisoners in federal and state prisons with respect to the free exercise of Native American religions. DISCUSSION DRAFT, *supra* note 11, at 28-30. Finally, title IV establishes a commission to reform the existing governmental procedures used to disburse eagle parts to Native American religious practitioners and evaluate the need for the existing procedures to include other birds, animals, or plants held sacred by traditionally religious Native Americans. DISCUSSION DRAFT, *supra* note 11, at 30-34.

19. *See Improvement of the American Indian Religious Freedom Act: Hearings on S. 2250 Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. (1988) [hereinafter *Hearings S. 2250*]; *American Indian Religious Freedom Act Amendments of 1989: Hearings on S. 1124 Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 1st Sess. (1989) [hereinafter *Hearings S. 1124*]; 135 CONG. REC. S16,799-800 (daily ed. Nov. 21, 1989); 137 CONG. REC. S763 (daily ed. Jan. 14, 1991).

20. As of March 30, 1992, over 60 tribal groups have passed resolutions in favor of the proposed amendment. (Resolutions on file at the Native American Rights Fund). Indeed, at a recent Oversight Hearing before the United States Senate Select Committee on Indian Affairs, many tribal and religious leaders testified in support of the proposed amendment. *Oversight Hearing Before the Senate Select Comm. on Indian Affairs on the American Indian Religious Freedom Act* (1992) [hereinafter *Oversight Hearing*]. *See Tribes' Religious Freedom: Congressional Hearing in Portland Should Advance American Indians' Quest for Religious Equality*, OREGONIAN, Mar. 2, 1992; *Indians Launch Drive for Religious Rights: At a Portland Hearing, a Senate Panel Listens to Calls for Guaranteed Freedom of Worship*, OREGONIAN, Mar. 8, 1992.

21. The American Civil Liberties Union, national environmental groups, and national

draw criticism from groups representing timber, mining, archaeological, and ranching interests that portray past attempts to amend the AIRFA as unconstitutional establishments of religion.[22]

To determine whether the proposed 1993 amendment constitutes an establishment of religion, the amendment must be judged either by the test set out in the 1991 Fifth Circuit Court of Appeals decision of *Peyote Way Church of God, Inc. v. Thornburgh*[23] or the standard enunciated in the 1971 Supreme Court decision of *Lemon v. Kurtzman*.[24] In *Peyote Way*, the court upheld an exemption to federal drug laws for the sacramental use of peyote by members of the Native American Church, holding that even though the federal government singled out a particular religion for protection, the exemption did not violate the establishment clause since it was rationally related to the federal government's unique trust responsibility to preserve and protect Native American communities.[25] In *Lemon*, the Court first set out the generally accepted three-part establishment clause test, holding that in order to pass establishment clause scrutiny, a governmental action must have a secular purpose, not have a primary effect that either advances or inhibits religion, and not foster excessive governmental entanglement with religion.[26]

This article examines the federal government's unique relationship with Indian tribes, the *Lyng*, *Smith*, and *O'Lone* decisions, the proposed AIRFA amendment, and the *Peyote Way* and *Lemon* decisions in order to determine whether the proposed amendment violates the establishment clause. Part I explores the

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religious groups have indicated their approval of the proposed amendment. Many religious groups are also currently lobbying for the Religious Freedom Restoration Act of 1991, which would restore the law as it existed prior to the *Smith* decision. H.R. REP. No. 2797, 102d Cong. (1991).

22. *See, e.g., Hearings S. 2250, supra* note 19, at 114-20 (written testimony of Scott M. Matheson, attorney, Parsons, Bahle & Latimer, Salt Lake City, Utah, on behalf of American Mining Congress, Timber Associations of California, Alaska Miners Association, Colorado Mining Association, Montana Coal Council, Nevada Mining Association, Northwest Mining Association, Utah Mining Association, and Wyoming Mining Association). *Hearings S. 2250, supra* note 19, at 367 (testimony by the Society for American Archaeology). *Hearings S. 2250, supra* note 19, at 152 (statement by the Public Lands Council, National Cattlemen's Association and National Wool Growers Association). Similarly, at least three courts have suggested that governmental protection of Native American religious practices may violate the establishment clause in cases dealing with Indian sacred sites on public land. Badoni v. Higginson, 638 F.2d 172, 179 (10th Cir. 1980); Inupiat Community v. United States, 548 F. Supp. 182, 189 (D. Alaska 1982); Crow v. Gullet, 541 F. Supp. 785, 794 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983).

23. 922 F.2d 1210 (5th Cir. 1991).

24. 403 U.S. 602 (1971).

25. *Peyote Way*, 922 F.2d at 1216-17.

26. *Lemon*, 403 U.S. at 612-13.

origins and present nature of the trust relationship between the United States government and Indian communities, with special attention to the federal government's treatment of Indian religions. Part II details the adverse effects of the Supreme Court's recent free exercise clause jurisprudence in *Lyng*, *Smith*, and *O'Lone* and explains how these effects would be remedied by the proposed amendment. Part III explains and defends the *Peyote Way* establishment clause standard as a sensible and logical melding of establishment clause and federal Indian law principles. Part III also shows that the proposed amendment is clearly constitutional when judged by the *Peyote Way* standard. Part IV argues that in addition to passing the establishment clause test set out in *Peyote Way*, the proposed amendment passes the traditional three-part establishment clause standard articulated in *Lemon*. Finally, part V concludes by urging passage of the proposed amendment by Congress as quickly as possible.

I. THE HISTORICAL CONTEXT: INDIAN RELIGIONS AND THE TRUST DOCTRINE

As sovereign nations pre-existing the formation of the United States, Indian tribes occupy a unique status in the American political structure.[27] Members of Indian tribes represent the only group of people in the United States who are separately identified in the United States Constitution as politically distinct.[28] Besides being

27. Prior to White contact, at least six hundred distinct tribal societies existed in North America. These tribes were sovereign nations with their own distinct languages, economies, political forms, religions and cultures. JOHN COLLIER, INDIANS OF THE AMERICAS 102 (1947); HAROLD E. DRIVER, INDIANS OF NORTH AMERICA 287-308 (2d rev. ed. 1969); COHEN, *supra* note 11, at 229.

28. Since the framers of the United States Constitution regarded Indian tribes as sovereign nations, no general power over Indian affairs exists in the Constitution. Nell J. Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 200 (1984). Indians, however, are expressly mentioned three times in the Constitution. U.S. CONST. art. I, § 8, cl. 3 ("Indian commerce clause" granting the federal government the exclusive power to regulate commerce with the Indian tribes); U.S. CONST. art. I, § 2, cl. 3 (excluding "Indians not taxed" from apportionment for purposes of representation and direct taxation); U.S. CONST. amend. XIV, § 2 (apportioning representatives "excluding Indians not taxed"). Additionally, Indians are implicitly mentioned two times in the Constitution. U.S. CONST. art. II, § 2, cl. 2 ("treaty clause" granting the federal government authority to enter into treaties [with foreign nations and Indian tribes]); U.S. CONST. amend. XIV, § 1 (limiting citizenship to persons "subject to the jurisdiction" of the United States [excluding tribal Indians]).

Courts have generally held that the principal foundations for federal power over Indian affairs are the Indian commerce clause and the treaty clause. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian

uniquely cast in the Constitution, Indian tribes derive their special political and legal status from their pre-contact aboriginal rights[29] and their treaty relationships with the United States government.[30] In addition, Indian tribes are unique political entities because of the federal government's assumption of a fiduciary responsibility to ensure their continued existence.

This trust relationship between Indian tribes and the federal government was first articulated in two Supreme Court decisions in the early 1830s. In *Cherokee Nation v. Georgia*,[31] the Cherokee Indian Tribe attempted to enjoin the enforcement of Georgia stat-

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tribes and for treaty making.").

29. Chief Justice John Marshall laid the foundations of federal Indian law in 1823 by holding that the United States gained title to Indian lands by virtue of "discovery." Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 567 (1823). Further, Marshall held that this title was subject to the original inhabitants' "aboriginal title," a right of occupancy which may only be extinguished by purchase or conquest by the United States. *Id.*

The racist assumptions underlying Justice Marshall's *Johnson* opinion were most clearly stated by Marshall's close friend and fellow justice, Joseph Story, who wrote:

> The title of the Indians was not treated as a right of propriety and dominion, but as a mere right of occupancy. As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations. The territory over which they wandered, and which they used for their temporary and fugitive purposes, was, in respect to Christians, deemed as if it were inhabited only by brute animals.

JUSTICE STORY, COMMENTARIES § 152, *reprinted in* THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 29 (Mark F. Lindley ed., 1926).

Johnson was modified in 1955, when the Supreme Court held that aboriginal title may be extinguished by the federal government without compensation since it is not a form of property protected by the takings clause of the Fifth Amendment to the United States Constitution. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 284-85 (1955). The Fifth Amendment provides, in part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. However, aboriginal title (as well as aboriginal hunting, fishing, gathering, and water rights) may only be extinguished by explicit federal treaties, statutes or executive orders. *See, e.g.*, Winters v. United States, 207 U.S. 564, 577 (1908) (water rights necessary for survival reserved for Tribe by federal government unless explicitly extinguished); United States v. Winans, 198 U.S. 371, 383 (1905) (fishing rights).

30. Until the passage of 25 U.S.C. § 71 in 1871, which abolished the practice of making treaties with Indian tribes, the United States purchased large amounts of Indian lands by entering into over 650 treaties pursuant to the treaty clause of the United States Constitution. In most treaties, tribes relinquished land in exchange for promises that the United States would create a reservation for the tribe. *See* INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, A CHRONOLOGICAL LIST OF TREATIES AND AGREEMENTS MADE BY INDIAN TRIBES WITH THE UNITED STATES (1973) (listing of all treaties and agreements entered into with the Indian tribes); 2 INDIAN AFFAIRS, LAWS AND TREATIES (Charles J. Kappler ed., 1904) (collection of texts of treaties).

Like aboriginal rights, treaties with Indian tribes may be abrogated by federal laws, if done expressly by Congress. Winters v. United States, 207 U.S. 564, 577 (1908); Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903). Unlike aboriginal rights, however, Indian treaty rights are a form of property protected by the Fifth Amendment. Shoshone Tribe of Indians v. United States, 299 U.S. 476, 497 (1937). Thus, when treaties are abrogated by Congress, tribes are entitled to just compensation. *Id.*

31. 30 U.S. (5 Pet.) 1 (1831).

utes on lands secured to the Cherokees by federal treaties. Writing for the Court, Chief Justice John Marshall held that the Tribe could not invoke the original jurisdiction of the Supreme Court since the Tribe was not a "foreign state" within the meaning of that term in article III of the United States Constitution.[32] Instead, Marshall characterized Indian tribes as "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian."[33]

One year later, in *Worcester v. Georgia*,[34] two non-Indian missionaries residing on Cherokee lands appealed from their conviction in Georgia state courts for violating some of the statutes challenged in *Cherokee Nation*. In *Worcester*, the Marshall Court held that the state statutes were unlawful under the supremacy clause and construed the federal treaties and the Indian Trade and Intercourse Acts as protecting the Indians' status as distinct political communities "having territorial boundaries, within which their authority [of self-government] is exclusive."[35] Thus, when taken together, the two "Cherokee cases" established that the federal government has a trust obligation to ensure the continued existence of semi-sovereign Indian tribes.

It was more than five decades after the Cherokee cases before the Supreme Court again addressed the scope of this trust obligation.[36] In the late 1800s and early 1900s, courts read the trust obli-

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32. *Id.* at 19-20.

33. *Id.* at 17.

34. 31 U.S. (6 Pet.) 515 (1832).

35. *Id.* at 557.

36. Immediately following the Cherokee cases, Indian tribes did not seek judicial review of actions by federal officials which deprived them of their ancestral homelands. For instance, Indian tribes did not challenge the administration of the Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830), which forced the removal of most of the eastern and southern tribes to the trans-Mississippi region. *See* JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION (1988) (describing the painful journey of sixteen thousand Cherokees from their ancestral homes in Georgia to what is now eastern Oklahoma).

Later, many Indian tribes located west of the Mississippi River were removed to reservations a fraction of the size of their territories by the federal government, due in part to Whites' desire for good farmland, valuable mineral deposits, and overland travel routes. *See* COHEN, *supra* note 11, at 124; DEE BROWN, BURY MY HEART AT WOUNDED KNEE (1970). Again, Indian tribes did not immediately challenge the removals which were often fraudulent and violative of treaty and aboriginal rights. For example, in 1877 the federal government unilaterally changed the terms of the 1868 Fort Laramie Treaty in order to gain control of the Black Hills of present-day South Dakota, where gold had been discovered. The Treaty guaranteed the Lakota and Dakota nations "absolute and undisturbed use of the Great Sioux Reservation," which included all of what is now South Dakota, and parts of Nebraska, Wyoming, North Dakota, and Montana. After initially filing a petition in the Court of Claims in 1923, the Sioux Nation finally was awarded over seventeen million dollars as just compensation for the Fifth Amendment "taking" by the Court of Claims in 1974. Sioux Nation v. United States, 33 Ind. Cl. Comm'n 151 (1974). Although this decision was

gation set out in the Cherokee cases to allow Congress virtually unlimited or plenary power to legislate on behalf of Indian tribes.[37] During this time, courts applying this "plenary power doctrine" did not closely scrutinize federal policies designed to assimilate tribal Indians into mainstream American society. Consequently, the implementation of these policies did great damage to Native American tribes.

Perhaps the most harmful federal assimilationist policy was the allotment of Indian tribal lands by the federal government in the late 19th and early 20th centuries.[38] Pursuant to the General Allotment Act of 1887[39]—the centerpiece of the federal government's allotment policy—many tribal members were allotted 160 acres of tribal land and considerable amounts of "surplus" land were surrendered to the government for the public domain or for disposition to homesteaders. The government, however, grossly underfunded the allotment program, leaving many impoverished In-

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affirmed by the United States Supreme Court in United States v. Sioux Nation, 448 U.S. 371, 388 (1980), many of the Sioux bands have refused to accept the compensation, asking instead for the return of the Black Hills, which they consider to be sacred land. Oglala Sioux Tribe v. United States, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (tribe unsuccessfully sought restoration of Black Hills; suit barred by res judicata). In 1985, the "Sioux Nation Black Hills Act" was introduced in the United States Senate by Senator William Bradley of New Jersey. The bill would re-establish a portion of the Great Sioux Reservation using federally-held lands in the Black Hills area. S. 705, 100th Cong., 1st Sess. (1985). *See* Richard Pemberton, Jr., *"I Saw That It Was Holy": The Black Hills and the Concept of Sacred Land*, 3 LAW AND INEQ. J. 287, 300-11 n.94; EDWARD LAZARUS, BLACK HILLS, WHITE JUSTICE (1991).

37. For example, in 1903, a statute which allotted Indian tribal land and authorized the sale of unalloted "surplus" lands was upheld against a constitutional challenge by an Indian tribe in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). In *Lone Wolf*, the Court deferred to the plenary or unlimited power of the Congress to administer tribal property on behalf of Indian tribes. The Court "presumed" that the government "would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race." *Id.* at 565.

38. Another harmful federal policy was the Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (1970)), a federal statute which gave the federal government criminal jurisdiction to try and punish murder and other serious crimes in Indian Country. Although the act represented a significant interference with tribal self-government, the Supreme Court in United States v. Kagama upheld it, declaring that "[t]hese Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power." 118 U.S. 375, 383-84 (1886).

Additionally, federal policies which allowed the slaughter of millions of buffalo in the 1860s, 1870s, and 1880s by sportsmen and commercial hunters had an adverse effect on the Plains Indians, whose entire political, economic, and spiritual way of life was centered on the previously vast herds. R. UTLEY, THE LAST DAYS OF THE SIOUX NATION 229-30 (1963) ("For the Plains Indians, the disappearance of the buffalo was a shattering cultural catastrophe.").

39. Ch. 119, § 1, 24 Stat. 388 (1887) (current version codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381 (1982)).

dians with no choice but to sell their land to non-Indian interests.[40] Thus, although allotment of communally owned Indian lands was designed to turn Indians into self-sufficient farmers,[41] it actually reduced the amount of Indian farming.[42] Indeed, allotment was only a success for those who had hoped that it would open up sparsely occupied reservation lands to white settlement and railroad, and mining and timber operations[43] since allotment resulted in the transfer of over three-fourths of the previous Indian land base to white settlers and corporations.[44]

In addition to fragmenting many tribes' communally owned land base, the replacement of traditional Indian religions with Christianity was an integral part of the federal government's overtly assimilative policies of the late 1800s and early 1900s.[45] Since Christianity was equated with civilization and Indian religions were regarded as primitive and immoral, government agents were steadfast in their promotion of Christian sects and their suppression of Indian dances, rituals, and other traditional cultural and religious practices.[46] For many years, the federal government

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40. The federal government appropriated less than ten dollars per allotment for seeds and equipment. *History of the Allotment Policy, Hearings on H.R. 7902 before the House Committee on Indian Affairs.* 73rd Cong., 2d Sess., pt. 9, 428-29 (1934) (testimony of D.S. Otis).

41. *See generally* AMERICANIZING THE AMERICAN INDIAN: WRITINGS BY THE "FRIENDS OF THE INDIAN," 1880-1900 (Francis P. Prucha, ed., 1974).

42. FRANCIS P. PRUCHA, THE GREAT FATHER 305 (abridged ed. 1986).

43. John W. Ragsdale, Jr., *The Movement to Assimilate the American Indians: A Jurisprudential Study*, 57 UMKC L. REV. 399, 406-07 (1989) ("The unshakable greed for Indian lands, which had dominated most of the United States' Indian policy throughout the nineteenth century, was clearly present in the late 1800s when the assimilation movement began in earnest.").

44. As a result of the allotment policy, Indian landholdings were reduced from 138 million acres in 1887 to 48 million in 1934. Of this 48 million acres, nearly 20 million were desert or semiarid and virtually useless for any kind of annual farming ventures. *Memorandum, Hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73 Cong., 2d Sess. 16 (1934) (J. Collier Memorandum).

45. In President Grant's 1869 Peace Policy, he asked all Christian missionary societies for nominations of persons to be civilian Indian agents and created a presidential advisory board of religious leaders to give advice on Indian policy. The commissioner of Indian Affairs remarked that:

> [T]he President wisely determined to invoke the cooperation of the entire religious element of the country, to help by their labors and counsels, to bring about and produce the expenditure of the munificent annual appropriation of money by Congress, for the civilization and Christianization of the Indian race.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1870 10 (Washington, D.C. 1870).

46. In 1883 the commissioner of Indian Affairs prohibited the sun dance, the scalp dance, and the war dance, stating that:

> [T]here is no good reason why an Indian should be permitted to indulge in practices which are alike repugnant to the common decency and morality; and the

actively sponsored Christian missionary groups on Indian reservations,[47] actually dividing up reservations between denominations.[48] For a time, the government even outlawed traditional Indian religious ceremonies.[49] For instance, in 1921, the Office of Indian Affairs released an official circular which advised that "[t]he sundance, and all other similar dances and so-called religious ceremonies are considered 'Indian Offenses' under existing regulations, and corrective penalties are provided."[50] Additionally, in an effort to destroy Indian culture, the federal government took Indian children from their parents and sent them far away to boarding schools for as long as eight years, during which time they were not permitted to see their parents, relatives, or friends.[51] The boarding schools, often run by religious denominations, forbade young Indian children to speak their native languages, practice their native religions, or dress or wear their hair in traditional ways.[52] The goal of the educators was, in the words of Richard Pratt, the founder and head of the Carlisle School for Indians in Pennsylvania, to "kill the Indian in him, and save the man."[53]

Federal assimilationist policies such as the allotment of tribal land, criminalization of traditional Indian religious practices, pro-

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> preservation of good order on the reservations demands that some active measures should be taken to discourage and, if possible, put a stop to the demoralizing influence of heathenish rites.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1883 XIV-XV (Washington, D.C. 1883).

47. See, e.g., 25 U.S.C. § 280 (1922) (acts issuing patents for Indian Lands to religious societies); 35 Stat. 814 (1909); 25 U.S.C. § 280(a) (1990); 25 U.S.C. § 348 (1887); 23 Stat. 26 (1884); LAURENCE F. SCHMECKEBIER, *The Office of Indian Affairs, Its History, Activities and Organization, Prepared for the Institute for Government Research* 40 (Baltimore 1927) (between 1819 and 1842, the federal government made appropriations of $214,500 to missionary societies for the education of American Indians); *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1894* (Washington 1895) (reporting that missions customarily used stone or timber from the reservations in erecting their buildings).

48. Jill E. Martin, *Constitutional Rights and Indian Rites: An Uneasy Balance*, 3:2 WESTERN LEGAL HISTORY 245, 249 (1990) ("Competition between the different denominations became fierce at times, until the government resolved the problem by assigning agencies to each denomination. Each was allowed to establish its religion at its agencies, without competition from other sects, by setting up churches and schools.").

49. *See, e.g., Ann. Rep., supra* note 42, at XV; *Bureau of Indian Affairs Regulations for Indian Courts* (1892).

50. *Office of Indian Affairs, Circular No. 1665* (1921).

51. PETER FARB, MAN'S RISE TO CIVILIZATION AS SHOWN BY THE INDIANS OF NORTH AMERICA FROM PRIMEVAL TIMES TO THE COMING OF THE INDUSTRIAL STATE 257 (1968).

52. ALVIN M. JOSEPHY, JR., NOW THAT THE BUFFALO'S GONE 85 (1984); T.C. MCLUHAN, TOUCH THE EARTH 103-04 (1971).

53. Richard Pratt, *The Advantages of Mingling Indians with Whites*, in AMERICANIZING THE AMERICAN INDIANS 261 (Francis P. Prucha ed., 1973).

motion of Christian missions in Indian Country, and separation of young Indian children from their parents and traditional culture through the boarding school system continued unabated until 1934, when Congress passed the Indian Reorganization Act.[54] Also in the 1930s, the Supreme Court began to reduce the expansive discretion previously conferred upon Congress by the plenary power doctrine.[55] Because of this new governmental attitude, some of the damage done to Indian tribes by the previous era of assimilative policies was beginning to be repaired.

In the 1950s, however, federal Indian policy changed once again. The federal government began to "terminate" many Indian tribes, stripping them of their unique relationship with the federal government and ending benefits based on federal statutes, treaties, and aboriginal rights.[56] The proponents of this policy believed that cutting Indian tribes loose from the federal government would allow them to prosper.[57] Instead, termination often harmed Indian tribes and hindered their ability to maintain their separate cultural status.[58] For example, the termination of the Menominee Tribe

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54. Pub. L. No. 383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1982)). The Act prohibited further individual allotment of Indian lands, 25 U.S.C. § 461 (1982); returned lands withdrawn for homesteads to tribal use, *Id.* at § 463; authorized annual appropriations of funds for land purposes, *Id.* at § 465; made mandatory conservation of tribal lands, *Id.* at § 466; established a revolving credit fund for the benefit of individual Native Americans and tribes, *Id.* at § 470; encouraged tribal self-government and self-management of economic resources, *Id.* at § 469; provided funds for educational loans, *Id.* at § 471; and gave Native Americans a preference under Civil Service rules for employment in the Indian Service, *Id.* at § 472(a).

Also in the 1930s, Congress established a National Monument at Pipestone, Minnesota, in order to preserve a sacred site for Indian religious use. 16 U.S.C. § 445(c) (1937).

55. In United States v. Creek Nation, 295 U.S. 103, 110 (1935), and Seminole Nation v. United States, 316 U.S. 286, 296 (1942), the Court held that the United States government was to be held accountable to Indian tribes regarding tribal property because of the fiduciary relationship described earlier in the Cherokee Nation cases.

56. *See, e.g.*, H. Con. Res. 108 (67 Stat. B132) (1953) (It was the "sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York and Texas . . . . should be freed from Federal supervision and control and all disabilities and limitations specifically applicable to Indians."); Pub. L. 280, 67 Stat. 588, (1953) (permitting state governments to assume both civil and criminal jurisdiction over Indian reservations in the states of California, Minnesota, Nebraska, Oregon, Wisconsin, and the then-territory of Alaska); 25 U.S.C. §§ 741-60 (1976) (Paiute Indian Tribe of Utah forced to distribute its assets to tribal members and then to disband).

57. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 18 (1983).

58. During the termination period, large amounts of Indian land passed into non-Indian hands, tribal economic development was generally ignored, and Indians were encouraged to relocate in large cities off their reservations. *See* DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY 1945-1960 (1986); DELORIA & LYTLE, *supra* note 57, at 20 ("The impact of termination upon those tribes affected was unmistakable and

transformed their moderately prosperous reservation into the poorest county in Wisconsin.[59]

The 1960s marked the beginning of the federal government's current policy of recognizing Indian tribes as semi-sovereign political entities. Beginning in the 1960s, the Supreme Court subjected congressional actions to meaningful scrutiny[60] and used the trust doctrine to protect rights secured through treaties, statutes, and agreements.[61] Courts also strengthened the trust doctrine as an independent cause of action for Indian tribes against executive agencies of the United States government.[62] Also during this period, the federal government ended its harmful termination policies[63] and, pursuant to its trust responsibility to Indian tribes,[64] passed legis-

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significant. If the policy did not completely destroy Indian culture, it encroached substantially upon Indian attempts to remain Indian.").

59. The Menominee tribe's status was restored by the Menominee Restoration Act of 1974. *See N. Peroff, Menominee Drums: Tribal Termination and Restoration,* 1954-1974 (1982); Joseph F. Preloznik and Steven Felsenthal, *The Menominee Struggle to Maintain Their Tribal Assets and Protect Their Treaty Rights Following Termination,* 51 N.D. L. REV. 53 (1974).

60. Menominee Tribe v. United States, 391 U.S. 404, 413 (1968) (limiting holding in *Lone Wolf* by requiring explicit proof of congressional intent to terminate or modify a treaty). *See also* United States v. Sioux Nation, 448 U.S. 371, 414-15 (1980) (removing the presumption of good faith that *Lone Wolf* attached to congressional actions and holding that the political question doctrine, long a bar to tribal challenges to federal actions, was inapplicable to congressional relations with Native Americans); Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 85 (1977) (rejecting the notion that federal legislation concerning Indians is immune from judicial scrutiny).

61. For instance, in *Menominee Tribe,* the Supreme Court construed the Wolf Creek Treaty broadly, reasoning that the treaty secured the Menominee "their way of life" and that their way of life included the right to hunt and fish. *See also* United States v. White, 508 F.2d 453 (8th Cir. 1974) (because right to use hunted eagles in religious rituals is an integral part of cative life, this right is implicit in treaty).

62. For example, in 1973, the Federal District Court for the District of Columbia in Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D. D.C. 1973), used the trust doctrine to enjoin the Secretary of the Interior from further lowering the water level in a lake essential to the well-being of an Indian tribe. *See* Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966) (United States has duty to disclose discovery of valuable gas on leased Indian land). *See generally* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians,* 27 STAN. L. REV. 1213, 1230-34 (1975).

63. In a letter to Congress dated July 8, 1970, President Nixon formally abandoned the federal policy of termination of Indian tribes, declaring that the policy was "morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self sufficiency among Indian groups." 116 CONG. REC. 23,132 (1970).

64. In Morton v. Mancari, 417 U.S. 535, 552 (1974), the Supreme Court explicitly identified the trust responsibility as a source of federal power to legislate on behalf of Indian tribes which is implicit in either the Constitution itself or in treaties with Indian tribes. This concept was first articulated in the Cherokee cases and later refined in United States v. Kagama, 118 U.S. 375 (1886). This refinement has been described by one commentator as "recast[ing] the Marshallian guardianship, treating it as a source of federal power in addition to and apart from the express power in the Constitution to regulate Commerce with the

lation which strengthened tribal governments and attempted to redress the continuing problems associated with chronic poverty on Indian reservations.[65] For instance, Indian tribes benefitted from the "War on Poverty" of the 1960s,[66] the Indian Self-Determination and Education Assistance Act of 1975,[67] and the Indian Child Welfare Act of 1978.[68]

The trust responsibility has also justified many recent laws and regulations designed to protect traditional Indian religions from widespread governmental insensitivity and thus reverse the adverse effects of prior federal policies. For example, federal legislation returned two sacred sites to Indian tribes,[69] granted Indian access and restricted non-Indian access to several Indian sacred sites,[70] exempted eagles taken for Indian religious purposes from

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Indian tribes." CHAMBERS, *supra* note 62, at 1223.

65. *See* COHEN, *supra* note 11, at 180-206.

66. During the "War on Poverty" Congress provided additional funding to existing programs specially designed for Indians. *See, e.g.*, 25 U.S.C. § 175 (1988) (legal services); 25 U.S.C. §§ 271-304 (1988) (education); 25 U.S.C. §§ 452-54 (1988) (education, medical attention, and social welfare).

67. 25 U.S.C. § 450a to n (1976). This Act permits the Secretary of the Interior to transfer management of certain Bureau of Indian Affairs programs to the tribes. Regulations under the Act specifically permit transfer of authority over land use planning, forest management, timber sales, range management, agricultural leasing, and maintenance of land use records. 25 C.F.R. §§ 271.31 to .34 (1980). However, the Act explicitly prevents the Secretary from abrogating trust responsibilities to tribes in matters regarding tribal resources. 25 U.S.C. §§ 450j(f), 450n(2) (1976).

68. Pub. L. No. 95-608, 92 Stat. 3069 (1978). In the Act, Congress established minimum standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes in order to ensure that, whenever possible, the cultural values of the tribe are not denied the orphaned Indian child.

69. Pub. L. No. 98-408, 98 Stat. 1533 (1984) (return of sacred lands in Arizona to the Zuni tribe); Pub. L. No. 91-550, 84 Stat. 1437 (1970) (return of the Blue Lake area in New Mexico to the Pueblo de Taos Tribe).

70. 16 U.S.C. § 4305 (1988) (Federal Cave Resources Protection Act requires notification to tribes of possible harm to, or destruction of, sites having religious or cultural importance on Indian land); 16 U.S.C. § 460uu-47 (1987), 16 U.S.C. § 410pp-6 (1988) (non-exclusive access to Indians for religious purposes assured at El Malpais National Monument and National Conservation Area, and Zuni-Cibola National Historical Park, respectively; lands may be temporarily closed to public in order to protect privacy of religious activities by Indian people); 16 U.S.C. § 543f (1984) (access to land by Indian people for traditional cultural and religious purposes shall be insured at National Forest Scenic-Research Areas); 16 U.S.C. § 410ii-4 (1980) (traditional Native American religious use not prohibited at Chaco Culture National Historical Park); 16 U.S.C. § 470cc (1979) (Archaeological Resources Protection Act requires notification to tribes of possible harm to, or destruction of, sites having religious or cultural importance); 16 U.S.C. § 228i(c) (1975) (access to Indian sacred or religious places on Havasupai Indian Reservation may not be prohibited); 25 U.S.C. § 640d-19 (1974) (guarantees Navaho and Hopi access to Cliff Spring religious shrine located in a disputed area between the Navaho and Hopi Reservations); 92 Stat. 1672, 1679 (1978) (no explorations, surveys, or excavations shall be authorized within a 200-yard radius of certain Indian shrines or religious sites on Pueblo of Santa Ana and Pueblo of Zia trust lands).

the Eagle Protection Act under certain circumstances,[71] and provided for the return of certain religiously or culturally significant Indian burial remains and funerary objects held in museums.[72] Indeed, in 1978, Congress pledged "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions" in the AIRFA.[73] In addition, federal administrative regulations exempted the sacramental use of peyote from federal drug laws[74] and required agencies to notify Indian tribes of possible harm to sacred sites on public land.[75]

II. The Need For Protective Legislation: The Adverse Effects of *Lyng*, *Smith*, And *O'Lone*

Although these recent laws and regulations protecting Native American religions have helped to counteract the effects of previous governmental policies, they have generally not provided adequate legal protections[76] for Native American religions burdened by insensitive government officials.[77] In the past, because of this lack of statutory protection, many Native Americans asserted their constitutional rights under the First Amendment's free exercise clause to eliminate governmental burdens on their traditional religions. Although Native Americans were not always successful under established First Amendment doctrine, state actors hindering religious practices were often required to prove that their ac-

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71. 16 U.S.C. § 668a (1962).

72. 25 U.S.C. § 3001 (1990) (Native American Graves Protection and Repatriation Act); 20 U.S.C. § 80q-9(a) (1989) (National Museum of the American Indian Act).

73. 42 U.S.C. § 1996 (1978).

74. 21 C.F.R. § 1307.31 (1990) (first promulgated in 31 Fed. Reg. 4679 (1966)).

75. 18 C.F.R. § 1312.7 (1984) (Tennessee Valley Authority); 32 C.F.R. §§ 229.7 (1984), 763.5 (1987) (Department of Defense); 36 C.F.R. § 296.7 (1984) (Forest Service); 43 C.F.R. § 7.7 (1984) (Public Lands, Interior Department); 47 C.F.R. § 1.1307 (1990) (Federal Communications Commission).

76. Federal statutes have not provided Native Americans adequate legal remedies for governmental interference with their traditional religions. For instance, the AIRFA, although a fine exposition of laudable policy objectives, has been held to not provide a viable cause of action in sacred site cases. Federal courts have generally held that the AIRFA merely requires federal agencies to "consider" the religious rights of Indians before developing federal land. Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983); Crow v. Gullet, 541 F. Supp. 785, 794 (D. S.D. 1982).

77. Although great strides have been made in government/Indian relations, conflict between sometimes ethnocentric governmental officials and traditional Native American practitioners is still quite common. These conflicts were documented in a task force report prepared pursuant to section two of AIRFA which evaluated AIRFA's policies and procedures in consultation with native traditional religious leaders. According to the report, there were 522 separate instances where federal agencies violated Indian religious practices in 1978 and 1979. AIRFA Report, *supra* note 12.

tions were justified by a compelling interest.[78]

The Supreme Court, by eliminating the compelling interest test in its *Lyng*, *Smith*, and *O'Lone* decisions, has adversely affected Native American worship at sacred sites, the sacramental use of peyote by members of the Native American Church, the religious use of eagle parts and feathers by Native Americans, and the religious rights of Native American prisoners. The following paragraphs discuss how the *Lyng*, *Smith*, and *O'Lone* decisions affected these religious practices and how the 1993 proposed amendment would remedy these adverse effects.

A. Sacred Sites

Native Americans often practice site-specific religions, attaching religious significance to particular natural sites such as high mountain peaks or secluded valleys.[79] Because Native Americans define themselves in terms of a common heritage enriched by past, present, and future ceremonies at sacred sites, the integrity of these sites is integral to tribal well-being.[80]

Despite pressures from the federal government to abandon their traditional religions,[81] Native Americans have continued to worship at their often remote and isolated sacred sites. However, developments interfering with Native American sacred sites located on public land[82] have made it difficult for many traditionally religious Indians to conduct their ceremonies and rituals.

When government developments have threatened sacred sites on public land, Native Americans have often sought constitutional protection from the First Amendment's free exercise clause since federal statutes have not afforded adequate protection.[83] Gener-

78. *See supra* note 4 and accompanying text.

79. For example, the Yurok, Karok, and Tolowa Indian tribes worship in the "high country" of northwestern California and the Wintu, Pit River, Modoc, and Karok Indian tribes worship at Panther Meadows, near Mt. Shasta, California. The "high country" was threatened in the *Lyng* case by a logging road and timber harvesting. *See infra* notes 91-93 and accompanying text. Panther Meadows is currently threatened by a proposed ski resort. *See infra* note 96 and accompanying text.

80. One commentator has noted that "[t]he ceremonies that belong to these sacred sites involve a process of continuous revelation and provide the people with the necessary information to enable them to maintain a balance in their relationships with the earth and other forms of life." Vine Deloria, Jr., *Sacred Lands and Religious Freedom*, NATIVE AM. RIGHTS FUND LEGAL REV. 1, 5 (1991).

81. *See supra* notes 45-53 and accompanying text.

82. Native American sacred sites are often located on public land, because Indian reservations were often created without regard to the locations of sacred sites. *See* AIRFA REPORT, *supra* note 12, at 51; Russell L. Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 OR. L. REV. 363, 396 (1986).

83. *See supra* note 76.

ally, courts have not been receptive to their claims. For instance, in some cases, courts avoided the compelling interest test by holding either that the Indian religion would not be "burdened"[84] or that the sacred sites were not "central or indispensable" to Indian religion.[85] Even if Native Americans could convince courts that their religions were burdened and their sacred sites were central or indispensable to their religions, courts often held that certain government interests, such as the maintenance of a certain water level for a hydroelectric dam[86] or off-shore oil drilling in a particular area,[87] were compelling. In other cases, courts held that since the Native American plaintiffs did not have a property interest in their sacred sites, their claims were without merit.[88]

In 1986, however, Native Americans won their first major victory in their long quest to protect their sacred sites located on public land by invoking the free exercise clause in the landmark decision of *Northwest Indian Cemetery Protective Ass'n v. Peterson*.[89] In *Peterson*, the Ninth Circuit Court of Appeals prevented timber harvesting and the construction of a logging road which would have burdened Native American worship at a sacred site since the actions did not represent a compelling interest.[90]

The gains made in *Peterson* were short lived as the Supreme Court reversed *Peterson* in *Lyng v. Northwest Indian Cemetery Protective Ass'n*[91] in 1988. Writing for a five justice majority, Justice O'Connor held that even though the construction of the logging road and the harvesting of timber would "virtually destroy . . . the Indians' ability to practice their religion," the construction did not burden the Native Americans' religion because it did not punish Native Americans for practicing their religion or coerce them

84. Wilson v. Block, 708 F.2d 735, 742, 744-45 (D.C. Cir. 1983) (construction of a ski slope on a sacred mountain did not burden Indians' religious freedom); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447 (1988) (construction of logging road near sacred peak did not excessively burden Indians' religion).

85. Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1164 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

86. Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980).

87. Inupiat Co. of the Arctic Slope v. United States, 548 F. Supp. 182 (D. Alaska 1982).

88. Crow v. Gullet, 541 F. Supp. 785, 791 (D. S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983); Hopi Indian Tribe v. Block, 8 I.L.R. 3073, 3076 (D. D.C. 1981), *aff'd sub nom.* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983); Sequoyah v. Tennessee Valley Auth., 480 F. Supp. 608, 612 (E.D. Tenn. 1979), *aff'd on other grounds*, 620 F.2d 1159 (6th Cir. 1980).

89. 565 F. Supp. 586 (N.D. Cal. 1983), *modified*, 764 F.2d 581 (9th Cir. 1985), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

90. *Id.* at 596.

91. 485 U.S. 439 (1988).

into violating their individual religious beliefs.[92] In his dissent, Justice Brennan warned that the Court's decision would "strip[ ] respondents and all other Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life."[93] Two years after *Lyng*, in *Employment Division of Oregon v. Smith*,[94] the Court further diminished the protective scope of the free exercise clause. In *Smith*, Justice Scalia, writing for a five-justice majority, held that the State of Oregon's prohibition of the sacramental use of peyote—the central practice of the Native American Church—did not violate the free exercise clause because the compelling interest test could only be applied when the government acts specifically in order to punish a particular religion.[95]

Today, government actions threaten to destroy many Native American sacred sites. For example, Mt. Shasta in California,[96] Mt. Graham in Arizona,[97] the Badger-Two Medicine area in Montana,[98]

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92. *Id.* at 452-53.

93. *Id.* at 476 (Brennan, J., dissenting). Many commentators have also criticized this decision. *See, e.g.*, Donald Falk, *Lyng v. Northwest Indian Cemetery Protective Ass'n: Bulldozing First Amendment Protection of Indian Sacred Lands*, 16 ECOLOGY L.Q. 515 (1989); Peggy Healy, Note, *Lyng v. Northwest Indian Cemetery Protective Ass'n: A Form-Over-Effect Standard for the free exercise clause*, 20 LOY. U. CHI. L.J. 171 (1988); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 45-64 (1991); J. Brett Pritchard, Note, *Conduct and Belief in the Free Exercise Clause: Developments and Deviations in Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 76 CORNELL L. REV. 268 (1990).

94. 494 U.S. 872 (1990).

95. *Id.* at 886 n.3. Commentators have similarly criticized the Court's opinion in *Smith*. *See, e.g.*, Robert N. Clinton, *Peyote and Judicial Political Activism: Neo-Colonialism and the Supreme Court's New Indian Law Agenda*, 38:2 FED. BAR NEWS & J. 92 (1991); John Rhodes, *supra* note 93; Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV 1 (1991); Tom C. Rawlings, Comment, *Employment Div., Dep't of Human Resources v. Smith: The Supreme Court Deserts the Free Exercise Clause*, 25 GA. L. REV. 567 (1991); Chris Day, Note, *Employment Div. v. Smith: Free Exercise Clause Loses Balance on Peyote*, 43 BAYLOR L. REV. 577 (1991); Kenneth Marin, Note, *Employment Div. v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431 (1991); Sandra Ashton Pochop, Note, *Employment Div., Dep't of Human Resources of Oregon v. Smith: Religious Peyotism and the "Purposeful" Erosion of Free Exercise Protections*, 36 S.D. L. REV. 358 (1991).

96. At Mt. Shasta, the United States Forest Service is currently planning a timber sale and the construction of a ski lift which would destroy the religious value of Panther Meadows, a sacred site used by the Wintu, Pit River, Modoc and Karuk tribes. *See* Michael McCabe, *Shasta Battle Pits Skiers vs Indians*, S.F. CHRON., Nov. 25, 1991, at A1.

97. The Forest Service, the University of Arizona, and the Vatican are currently proposing to build an $80 million complex of three observatory telescopes and support facilities called the "Columbus project" on Mt. Graham. This development would desecrate and block access to sacred sites currently used by the San Carlos Apaches. *See* Marla Donato, *Come One, Come All to Telescope Feud*, CHI. TRIB., Jan. 11, 1992, at 1; *Pacheco says UA Won't Give in to Demands to Kill Scopes Project*, ARIZ. DAILY STAR, Oct. 16, 1991; *Heavenly Plan Pits A Graceful Squirrel Against Holy See: Vatican, Others Seek to Build Obser-*

and the Big Horn Medicine Wheel in Wyoming[98] are all threatened by governmental developments. According to the *Lyng* decision, the Native American religions that hold these sites sacred are not burdened since none of the developments punish Native Americans for practicing their religions or coerce Native Americans into violating their religious beliefs. According to the *Smith* decision, even assuming that the religions are burdened, none of these developers need prove a compelling interest since they do not intend to punish Native Americans for practicing their religions. Thus, the *Lyng* and *Smith* decisions give government officials virtually unlimited power to destroy sacred sites essential to the continued existence of Native American tribes.

The proposed AIRFA amendment recognizes that the destruction of ancient Native American holy places, strikes at the very heart of traditional Native American communities. The proposed AIRFA amendment would protect these essential holy places by requiring that "whenever a governmental action is posing or will pose a substantial and realistic threat of undermining or frustrating a Native American religion," the governmental agency must demonstrate a compelling interest.[100] Therefore, the proposed amendment would in effect reinstate the *Peterson* standard which required governmental actors to show a compelling interest if their actions burden the free exercise of religion. As a result, it will ultimately provide meaningful protection for sacred sites which have long been an integral part of many Native American religions.

B. The Sacramental Use of Peyote

Peyote is a small, spineless cactus with mild psychedelic

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vatory on U.S. Peak Where the Animals Live, WALL ST. J., March 1, 1990, at A1; *Oversight Hearing*, *supra* note 20 (testimony of Ola Cassadore Davis, Apache Survival Coalition).

98. The United States Forest Service plans to allow oil and gas development in the Badger Two-Medicine area held sacred by the Blackfeet Tribe. *See* Don Baum, *U.S. Approves Drilling on Sacred Indian Wild Land: The Blackfeet Tribe and Conservationists Oppose the Exploratory Montana Oil and Gas Well, An Appeal is Planned*, L.A. TIMES, March 2, 1991, at A28; Don Baum, *Blackfeet Battle U.S. Oil Plan*, NEWSDAY, Nov. 18, 1990, at 17; Jim Robbins, *Fighting Over the Oil on Hallowed Ground*, N.Y. TIMES, Dec. 28, 1986, § 4, at 12.

99. The Forest Service is planning timber and tourism development which would damage the Big Horn Medicine Wheel, a sacred site of the Northern Plains tribes from the surrounding four state area. *See* John G. Watts, *Sacred Circle*, NATIVE PEOPLES, Summer 1991, at 34; Geoffrey O'Gara, *Sacred Site or Tourist Attraction? Indians, Agency Spar Over Medicine Wheel*, WASHINGTON POST, Sept. 6, 1989, at A6.

100. DISCUSSION DRAFT, *supra* note 11, at 18-19. This section also requires that administrators give notice to and consult with appropriate Indian tribes and traditional leaders before a federal or federally-assisted undertaking affecting a sacred site may continue. *Id.* at 12-18.

properties that grows in northern Mexico and southern Texas.[101] It has been estimated that the indigenous peoples of North America have used peyote in religious ceremonies since ten thousand years before the "discovery" of America by Christopher Columbus.[102]

Today, the sacramental use of peyote is the central practice of the Native American Church, a religious denomination comprised of approximately 250,000 Native Americans.[103] The Church was officially incorporated in 1918 and has fought a continuing series of legal battles with government officials bent on imprisoning its members for illegal drug use.[104] This government interference is unfortunate since the spiritual and social support provided by the Native American Church has been very effective in combatting alcoholism among Native Americans.[105] Perhaps most importantly, the Native American Church has been instrumental in drawing together Native Americans from different regions and tribes, and cultivating a sense of pride in Indian culture and history.[106]

The criminalization of sacramental peyote use was effectively ended in many states after the 1964 landmark decision of the California Supreme Court in *People v. Woody*.[107] *Woody* reversed the criminal convictions of a group of Navajo Indians for the unauthorized use of peyote. The court held that the criminal convictions violated the free exercise clause of the First Amendment because the State of California had no compelling interest to justify

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101. OMER C. STEWART, PEYOTE RELIGION: A HISTORY 3 (1987).

102. *Id.* For more information about peyotism, see SILVESTER J. BRITO, THE WAY OF A PEYOTE ROADMAN (1989); TONY HILLERMAN, PEOPLE OF DARKNESS (1980); E. ANDERSON, PEYOTE: THE DIVINE CACTUS (1980); J.S. Slotkin, *The Peyote Way*, in TEACHINGS FROM THE AMERICAN EARTH, *supra* note 12, at 96-104.

103. STEWART, *supra* note 101 at 3.

104. The government's hostile attitude toward peyote use can be illustrated by a Bureau of Indian Affairs bulletin published in the 1920s which ridiculed the religious significance of peyote to Native Americans, insisting that any " 'religious' significance, however, is hardly to be placed in the same category as a genuine religious faith, as the word religion is rather improperly used to describe what is simply a custom or habit of a people." Robert E.L. Newberne, *Peyote: An Abridged Compilation from the Files of the Bureau of Indian Affairs*, (3d ed. 1925); John Collier Papers, Reel 8, 246 (0271), Yale University Library.

105. *See generally* Paul Pascarosa and Sanford Futterman, *Ethnopsychedelic Therapy for Alcoholics: Observations in the Peyote Ritual of the Native American Church*, 8 (No. 3) J. OF PSYCHEDELIC DRUGS 215 (1976) (religious peyote use has been helpful in overcoming alcoholism); Bernard J. Albaugh and Phillip O. Anderson, *Peyote in the Treatment of Alcoholism Among American Indians*, 131:11 AM. J. PSYCHIATRY 1247, 1249 (1974) ("the philosophy, teachings, and format of the [Native American Church] can be of great benefit to the Indian alcoholic"); STEWART, *supra* note 101, at 75 (noting frequent observations across many tribes and periods in history, of correlation between peyote religion and abstinence from alcohol).

106. STEWART, *supra* note 101, at 327 ("[E]xcept for the Indian powwow, [peyotism] is the most pan-Indian institution in America.").

107. 394 P.2d 813 (Cal. 1964).

prohibiting sacramental peyote use.[108] In no uncertain terms, the court found that sacramental use of peyote was a positive force in the lives of individual Indians since the church forbids the use of alcohol and promotes a sense of community among its Indian adherents.[109] Due in part to this finding, the court summarily rejected the State's all-too-familiar justification that it had a compelling interest in liberating members of the Native American Church from their "unenlightenment" and from a tradition that "shackles the Indians to primitive conditions."[110]

Woody was followed by the Arizona Supreme Court in *State v. Whittingham*[111] and by the Oklahoma Supreme Court in *Whitehorn v. State*[112] and has motivated statutory exemptions for the sacramental use of peyote in thirteen states.[113] Additionally, in 1966 the federal Drug Enforcement Agency promulgated an exemption, still in effect today, from federal drug laws for the sacramental use of peyote by members of the Native American Church.[114] As a result, another twelve states codified this federal exemption in their criminal laws.[115] Other states, however, continue to prohibit the sacramental use of peyote. In particular, the Oregon Court of Appeals and the North Carolina Supreme Court have refused to create constitutional exemptions for sacramental peyote use.[116]

In 1990, in *Employment Division of Oregon v. Smith*,[117] the Supreme Court gutted the *Woody* decision by holding that Oregon's prohibition of the sacramental use of peyote did not violate

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108. *Id.* at 821.

109. *Id.* at 818 n.3.

110. *Id.*

111. 504 P.2d 950 (Ariz. 1973), *cert. denied*, 417 U.S. 946 (1974).

112. 561 P.2d 539 (Okla. 1977).

113. ARIZ. REV. STAT. ANN. § 13-3402(b)(1-3) (1988); COLO. REV. STAT. § 12-22-317(3) (1985); IDAHO CODE § 37-2732A (Supp. 1992); IOWA CODE ANN. § 204.204(8) (West 1987); KAN. STAT. ANN. § 65-4116(c)(8) (1985); MINN. STAT. ANN. § 152.02(4) (West 1989); NEV. REV. STAT. §453.541 (1987); N.M. STAT. ANN. § 30-31-6(d) (West Supp. 1988); S.D. CODIFIED LAWS ANN. § 34-208-14 (1986); TEX. REV. CIV. STAT. ANN., Art. 4476-15 § 4.11 (Vernon Supp. 1989); WIS. STAT. ANN. § 161.115 (1989); WYO. STAT. § 35-7-1044 (1988); Oregon H.B. No. 3039 (1991).

114. 21 C.F.R. § 1307.31 (1990), first promulgated 31 Fed. Reg. 4679 (1966).

115. ALASKA STAT. § 11.71.195 (1989); MISS. CODE ANN. § 41-29-111(d) (Supp. 1992); MONT. CODE ANN. § 50-32-203 (1991); N.J. STAT. ANN. § 24:21-(c) (West Supp. 1992); N.C. GEN. STAT. § 90-88(d) (1990); N.D. CENT. CODE § 19-03.1-02.4 (1991); R.I. GEN. LAWS § 21-28-2.01(c) (1989); TENN. CODE ANN. § 39-17-403(d) (1982); UTAH CODE ANN. § 58-37-3(3) (1986); VA. CODE ANN. § 54-524.84:1(d) (Michie 1982); WASH. REV. CODE § 69.50.201(d) (Supp. 1992); W. VA. CODE § 60A-2-201(d) (1989).

116. Oregon v. Soto, 537 P.2d 142 (Or. App. 1975), *cert. denied*, 424 U.S. 955 (1976); North Carolina v. Bullard, 148 S.E.2d 565 (N.C. 1966), *cert. denied*, 386 U.S. 917 (1967).

117. 494 U.S. 872 (1990).

the free exercise clause. In *Smith*, the Supreme Court did not require Oregon to prove a compelling interest for prohibiting the central practice of the Native American Church since the State did not intend to punish members of the Native American Church for practicing their religion.[118] However, Justice O'Connor, in her concurring opinion in *Smith*, applied the compelling interest test to Oregon's actions, finding a compelling interest in the regulation of peyote use by Oregon citizens.[119] In dissent, Justice Blackmun bemoaned the majority's abandonment of the compelling interest test and Justice O'Connor's characterization of Oregon's interest in the "symbolic preservation of an unenforced prohibition" as compelling. Justice Blackmun noted that the State of Oregon had offered "no evidence that the religious use of peyote has ever harmed anyone"[120] and that the sale and use of peyote for non-sacramental purposes is practically non-existent.[121]

As a result of *Smith*, states that exempted the sacramental use of peyote from their criminal laws because of *Woody*'s holding that such exemptions were constitutionally required are free to once again punish the use of peyote as a serious criminal offense. In Oklahoma and California, where only a judicial exemption was in place, law enforcement officials may now arrest, convict, and imprison Native Americans for the possession or use of the peyote sacrament under the authority of *Smith*. Indeed, in Oklahoma, an elderly, life-long member of the Native American Church currently faces a felony prosecution for possession of the peyote sacrament.[122]

That United States citizens should have to practice their religion in fear that they will be arrested and imprisoned certainly may be viewed as a blatant act of racial and religious discrimination. The treatment of the Native American Church by government officials is a world-wide embarrassment for a country that prides itself on its dedication to human rights. The proposed amendment attempts to address this embarrassing lack of protection for a religion that pre-dates the formation of the United

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118. *Id.* at 886 n.3.

119. *Id.* at 905-06.

120. *Id.* at 911-12. *See also* ANDERSON, *supra* note 102, at 165-66 ("[M]ost investigations have shown that peyote is not a dangerous narcotic."); STEWART, *supra* note 101, at 3 ("Peyote is not habit forming, and in the controlled ambience of a peyote meeting it is in no way harmful.").

121. The dissent noted that "[B]etween 1980 and 1987 the Drug Enforcement Agency seized about 19 pounds of peyote. During the same period, the agency confiscated more than 15 million pounds of marijuana." *Smith*, 494 U.S. at 916 (citations omitted).

122. Oklahoma v. Kionute, No. CRF 91-80 (Okla. 1991).

States, as well as the "discovery" of America by Christopher Columbus. The amendment will create a complete legislative exemption from all federal, state, and local laws proscribing the sacramental use of peyote by Native Americans.[123] By doing so, the proposed amendment would finally protect a traditional Indian religious practice that serves only as a positive force in Native American communities.

C. *The Religious Use of Eagle Parts And Feathers*

Native American traditional religious practitioners often rely on natural substances such as wildlife, plants, and minerals for their ceremonies.[124] In particular, many Indian religions consider the use of eagle parts and feathers to be fundamental to the integrity and sacredness of their ceremonies.[125] Indeed, some have even compared the importance of the eagle feather in traditional Indian religions to the importance of the cross in Christianity.[126]

The religious use of eagle parts and feathers has been curtailed by federal efforts to protect an endangered species.[127] In 1940, to protect the bald eagle from extinction, Congress passed

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123. DISCUSSION DRAFT, *supra* note 11, at 25-26.

124. "Native traditional religions are based on the natural environment. Their practitioners rely on natural substances for their religious observances. Certain wildlife, plants and minerals—which may be worn, carried or simply present—are considered sacred and fundamental to the religious and ceremonial life." *AIRFA REPORT*, *supra* note 12, at 68.

125. For example, in the traditional religion of the Hopi Indians:

> Eagle shrines are located throughout the Black Mesa area. The prayer feathers that are so essential to our religious life and all our ceremonies must be Eagle feathers. Without them, we cannot place and carry our sacred messages to the spiritual world, we cannot hold the land for the Great Spirit. If the eagles are forced to flee the heart of our Mother Earth because of man's activity, it will no longer be possible for us to live in our spiritual and religious way. The life of all people as well as animal and plant life depend on the Hopi spiritual prayers and song. The world will end in doom.

Statement of Hopi Religious Leaders, Appendix to Petition for a Writ of Certiorari at 28a, Susenkewa v. Kleppe, 425 U.S. 903 (1976), *cert. denied*, Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975).

126. United States v. Thirty-Eight (38) Golden Eagles or Eagle Parts, 649 F. Supp. 269, 276 (D. Nev. 1986) ("As the claimant's affidavits demonstrate, experts in comparative religion have likened the status of the eagle feather in Indian religion to that of the cross in the Christian faith.").

127. *See, e.g.*, United States v. Dion, 476 U.S. 734, 745 (1986) (holding treaty rights to hunt eagles on reservation lands abrogated by the Eagle Protection Act); United States v. Top Sky, 547 F.2d 483, 485 (9th Cir. 1976) (selling of eagle feathers by Native Americans to non-Indians not a religious activity protected by the free exercise clause); *Thirty-Eight (38) Golden Eagles or Eagle Parts*, 649 F. Supp. at 269 (Eagle Protection Act does not violate the free exercise clause on its face.). *See generally* Britt Banks, Comment, *Birds of a Feather: Cultural Conflict and the Eagle in American Society*, 59 U. COLO. L. REV. 639 (1988); Tina S. Boradransky, Comment, *Conflicting Values: The Religious Killing of Federally Protected Wildlife*, 30 NAT. RESOURCES J. 709 (1990).

the Bald Eagle Protection Act, which forbids the killing, capture, sale, or possession of bald eagles.[128] The Act was amended in 1962 to protect both bald and golden eagles because young bald eagles can resemble golden eagles.[129] In recognizing the importance of eagle parts and feathers to Indian religion, the 1962 amendment also provided that the Secretary of the Interior *may* authorize the taking of bald and golden eagles if the Secretary determines that such taking "is compatible with the preservation of the bald eagle or the golden eagle."[130]

The 1962 amendment obviously allows the Secretary of the Interior great discretion. Unfortunately, the administrators of this provision have been insensitive to the religious needs of American Indians. In 1986, this pattern of administration was successfully challenged as a violation of the free exercise clause in *United States v. Abeyta*.[131] In *Abeyta*, a New Mexico District Court reversed the criminal conviction of a Navajo Indian for killing a golden eagle for religious ceremonies without a permit. The court found that the Secretary of the Interior had issued many permits to ranchers to kill eagles but had never issued any permits for Indian religious use, even though golden eagles were not an endangered species and "[t]he uncontradicted testimony at trial established that some eagles could be taken without harmful impact on the remaining population."[132] For these reasons, the court held that the "utterly offensive and ultimately ineffectual" administrative apparatus designed to issue permits violated the First Amendment's free exercise clause.[133]

However, since the *Abeyta* decision was effectively overruled by the Supreme Court's decisions in *Lyng* and *Smith* in 1988 and 1990, the Secretary of the Interior now has virtually complete discretion over whether to issue permits to Native Americans. Under the proposed amendment, the Director of the United States Fish and Wildlife Service must consult with Indian tribes and Native American traditional leaders and develop a plan to reform the existing administrative process used to disburse eagle parts to Native American traditional religious practitioners.[134] Thus, the amend-

128. 16 U.S.C. §§ 668-668d (1988).
129. 16 U.S.C. § 668a.
130. *Id.*
131. 632 F. Supp. 1301 (D. N.M. 1986).
132. *Id.* at 1307.
133. *Id.*
134. DISCUSSION DRAFT, *supra* note 11, at 30-33. The amendment also recognizes that tribal governments have the inherent right to administer a system for distributing eagle parts found on tribal lands. *Id.* at 32-33. Finally, the amendment mandates that the Fish

ment will help to ensure that the federal government becomes more sensitive to the bona fide religious needs of traditional Native American practitioners which are in danger after the *Lyng* and *Smith* decisions.

D. The Religious Rights of Native American Prisoners

Religious practices are an excellent means to achieve one of the goals of the American penal system—rehabilitating prisoners into productive members of society.[135] Indeed, the federal government regularly supplies prisons with chaplains and religious services paid for by taxpayers' money for most major religious denominations.[136] Unfortunately, many prisoners who practice minority religions have had to resort to litigation in order to practice their religions in prison, relying primarily on the free exercise clause of the First Amendment.[137]

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and Wildlife Service shall consult with Indian tribes and Native American traditional leaders and develop a plan to evaluate the need for the existing system to include other birds, animals, and plants which are held sacred by Native American practitioners. *Id.* at 33.

135. Treatment that degrades the inmate, invades his privacy, and frustrates the ability to choose pursuits through which he can manifest himself and gain self-respect erodes the very foundations upon which he can prepare for a socially useful life. Religion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality.

Barnett v. Rodgers, 410 F.2d 995, 1002 (1969) (citations omitted).

Religion represents a rich resource in the moral and spiritual regeneration of mankind. Especially trained chaplains, religious instruction and counseling, together with adequate facilities for group worship of the inmate's own choice, are essential elements in the program of a correctional institution.

AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS xxi (3d ed. 1966). *See also* C. Daniel Batson, *Sociobiology and the Role of Religion in Promoting Prosocial Behavior: An Alternative View*, 45 J. OF PERSONALITY AND SOC. PSYCHOL. 1380 (1983); Mark E. Heintzelman & Lawrence A. Fehr, *Relationship Between Religious Orthodoxy and Three Personality Variables*, 38 PSYCHOL. REP. 756 (1976); Comment, *The Religious Rights of the Incarcerated*, 125 U. PA. L. REV. 812, 853-54 (1977).

136. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (holding that the government's provision of prison chaplains does not violate the establishment clause).

137. Most prisoners who bring free exercise claims are members of minority faiths. For instance, of the Supreme Court's three decisions dealing with free exercise claims by prisoners, two were brought by Muslim prisoners. Cooper v. Pate, 378 U.S. 546 (1964) (per curiam); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). Another was brought by a Buddhist prisoner. Cruz v. Beto, 405 U.S. 319 (1972) (per curiam).

Before the 1960s, the courts traditionally adopted a "hands-off" policy to avoid or deny review of prisoners' constitutional claims. *See, e.g.*, Comment, *Backwash Benefits For Second Class Citizens: Prisoners' First Amendment and Procedural Due Process Rights*, 46 U. COLO. L. REV. 377, 378-79 (1975) (discussing hands-off policy); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963). By the late 1960s, however, the courts began to hear many complaints of prisoners, including First Amendment claims. *See, e.g.*, Note, *Religious Freedom in Prison: Free Exercise vs. The Need for Prison Security*, 36 ALB. L. REV. 416 (1972) (stating that hands-

Due in part to widespread poverty, lack of adequate legal representation, discrimination, and alcoholism, Native Americans are disproportionately confined in America's prisons.[138] Many Indian advocates and leaders believe that rehabilitating Indian prisoners with traditional Indian religions is a key to strengthening Indian tribal communities because traditional Indian religions commonly foster a sense of pride in Indian heritage and culture and require a sincere commitment to sobriety.[139] Because of the extreme importance of Native American religions to the rehabilitative process, Native Americans, like other prisoners who practice less common religions, have commonly asserted their constitutional right to practice their traditional religions in prison.[140]

Courts have been generally receptive to Native Americans' claims, requiring that prison administrators show a compelling interest to justify regulations which abridge religious rights. For instance, in *Teterud v. Burns*,[141] the Eighth Circuit Court of Appeals held that long hair was a protected form of Indian religious expression which was not outweighed by the prison's asserted interest in safety.[142] Also, in *Indian Inmates of Nebraska Penitentiary v. Gunter*,[143] a Nebraska District Court held that a Native American prisoner had a right to access to a traditional religious leader.[144]

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off doctrine eroded in 1960s). *See also* Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DET. C.L. REV. 795 (1977).

138. According to a 1991 prison population survey by the Native American Rights Fund, the Federal Bureau of Prisons and many state prisons have disproportionately high numbers of Indian inmates. (Survey on file at Native American Rights Fund). For instance, Native Americans make up approximately 1.5 percent of the inmate population in federal prisons although they make up less than .5 percent of the total United States population. GETCHES AND WILKINSON, *supra* note 13, at 7. Similarly, Native Americans make up 34.7%, 31.7%, 24.9%, and 15.5% of the prison populations of Hawaii, Alaska, South Dakota, and Montana, respectively, although they make up only 18.9%, 15.9%, 6.5%, and 4.7% of the total populations of those states. *Id.*

139. In the 1970s, Native American leaders designed, developed, and implemented the Swift Bird Project, a multi-million dollar corrections center for the Cheyenne River Sioux Tribe, using Indian culture as a prime rehabilitation tool for Indian offenders transferred to the Tribe from a five state area. *See* Elizabeth Grobsmith, *The Impact of Litigation on the Religious Revitalization of Native American Inmates in the Nebraska Department of Corrections*, *in* 34:124 PLAINS ANTHROPOLOGIST 135-47 (1989) (discussing the rehabilitative benefits of Indian religion and culture).

140. *Oversight Hearing*, *supra* note 20 (testimony of Walter R. Echo-Hawk, Senior Staff Attorney, Native American Rights Fund) ("About forty religion cases have been filed since 1972 by Native American prisoners to protect their First Amendment rights, demonstrating the pervasive nature of this problem on a national basis.").

141. 522 F.2d 357 (8th Cir. 1975).

142. *Id.* at 362-63.

143. 660 F. Supp. 394 (D. Neb. 1987).

144. *Id.* at 400-01.

However, the religious rights of prisoners were severely curtailed by the 1987 Supreme Court case of *O'Lone v. Estate of Shabazz*.[145] In *O'Lone*, the Court abandoned the compelling interest test and held that the government may abridge the religious freedoms of prisoners if there is a reasonable relationship between the abridgement and some justifiable government interest.[146] The Court identified four primary factors which are relevant in determining whether a reasonable relationship is present: (1) whether the regulation has a logical connection to the penological interests invoked to justify it; (2) whether the prisoners remain free to participate in other religious activities; (3) whether the accommodation of the prisoner's asserted right would have an undesirable impact on other inmates, on prison personnel, or on allocation of prison resources generally; and (4) whether ready alternatives that fully accommodate the prisoners' rights could be implemented at *de minimis* cost to valid penological interests.[147] In subsequent decisions, courts have used the third factor to restrict the rights of those who practice minority religions which are often despised by other inmates and prison personnel and do not fare well in the "cost-benefit analysis" used to allocate religious rights among prisoners.[148]

Under the *O'Lone* doctrine, Native American prisoners have fared especially poorly. Most notably, in *Iron Eyes v. Henry*,[149] the Eighth Circuit Court of Appeals held that the forcible cutting of an American Indian's long hair did not violate the free exercise clause of the First Amendment, even though the court had earlier held in *Teterud v. Burns*[150] that such conduct did violate the free

145. 482 U.S. 342 (1987) (upholding a prison regulation that prohibited Muslim prisoners from attending a weekly congregational service (jumu'ah) of central religious importance to their Islamic faith). *See generally* Matthew P. Blischak, Note, *O'Lone v. Estate of Shabazz: The State of Prisoners' Religious Free Exercise Rights*, 37 AM. U. L. REV. 453, 458 (1988) (*O'Lone* "[c]reates a standard that improperly subjects the religious free exercise rights of the incarcerated to the unquestioned judgment of prison administrators.").

Because *O'Lone* allows prison administrators such unbridled discretion, this article assumes that the subsequent restrictions of the scope of the free exercise clause for private citizens in *Lyng* and *Smith* do not affect the religious rights of prisoners. For example, the Eighth Circuit Court of Appeals, in a case challenging the constitutionality of prison regulations, noted that *Smith* did not affect prisoners' free exercise rights, but instead brought "the free exercise rights of private citizens closer to those of prisoners." Salaam v. Lockhart, 905 F.2d 1168, 1171 n.7 (8th Cir. 1990).

146. *O'Lone*, 482 U.S. at 349.

147. *Id.* at 350-52.

148. *See, e.g.*, Fromer v. Scully, 874 F.2d 69, 76 (2d. Cir. 1989) (rejecting Orthodox Jewish inmate's challenge to one inch beard length regulation in part because of fear of creating an "appearance of favoritism").

149. 907 F.2d 810 (8th Cir. 1990).

150. 522 F.2d 357, 362-63 (8th Cir. 1975).

exercise clause. In *Iron Eyes*, the court relied, in part, on the fact that the prison had only a small number of Native Americans and that special treatment of a minority religion would create resentment and unrest among other prisoners.[151] In a strong dissent, the author of the *Teterud* decision, Judge Heaney, characterized this aspect of the majority's holding as giving effect to a "prisoners' veto" which "makes hollow the notion that prisoners retain religious rights."[152] Additionally, in *Standing Deer v. Carlson*,[153] the Ninth Circuit Court of Appeals held that prison regulations banning the wearing of religious headgear by Native American prisoners in the prison dining hall did not violate the free exercise clause. The court emphasized that the regulation was enacted in response to prisoner complaints about dirty headgear in the dining hall and that several prisoners had threatened to "take matters into their own hands" unless prison officials took steps to alleviate the alleged unsanitary conditions.[154] Thus, the courts in *Iron Eyes* and *Standing Deer* took away religious rights important to Native American prisoners—rights integral to curing chronic alcoholism and creating a sense of pride in Indian heritage and culture—because of other inmates' religious and racial discrimination.

The proposed amendment provides that Native American prisoners who practice a Native American religion shall have access, comparable to the access afforded prisoners who practice Judeo-Christian religions, to their Native American traditional religious leaders, to items and materials used in religious ceremonies, and to Native American religious facilities.[155] Although the *O'Lone* case still only allows prisoners minimal religious rights, the proposed amendment would ensure that Native American religions and prisoners receive equal treatment by prison administrators. In particular, the proposed amendment would make it impossible for prison administrators to restrict the religious rights of Native Americans because there are only a small number of Native American prisoners or because of other prisoners' discrimination against Native Americans—as was done in *Iron Eyes* and *Standing Deer*. Therefore, by tying Native American religious rights to the rights of Judeo-Christian or "majority" religions, the proposed amend-

151. *Iron Eyes*, 907 F.2d at 815.

152. *Id.* at 821-23 (Heaney, J., dissenting).

153. 831 F.2d 1525 (9th Cir. 1987).

154. *Id.* at 1527.

155. DISCUSSION DRAFT, *supra* note 11, at 26. The proposed amendment also requires the Attorney General to establish a commission to investigate whether the religious rights of Native American prisoners in federal and state prisons are being abridged. DISCUSSION DRAFT, *supra* note 11, at 28-29.

ment avoids the adverse consequences of *O'Lone*'s third consideration and protects traditional religions which are an integral part of rehabilitating Indian prisoners into productive members of Indian tribes.

III. *PEYOTE WAY CHURCH OF GOD V. THORNBURGH*: EXTENDING *MORTON V. MANCARI* TO THE ESTABLISHMENT CLAUSE

Recent federal laws and regulations protecting Native American religions, such as the AIRFA and the exemption to federal drug laws for the sacramental use of peyote by members of the Native American Church, are good examples of the federal government's recent protection of Indian tribes as distinct cultural and political entities.[156] This positive interpretation of the federal government's trust obligation to Indian tribes is a welcome relief to Native Americans accustomed to federal policies designed to assimilate "savage" and "uncivilized" tribal Indians into American society.[157]

In the landmark 1974 case of *Morton v. Mancari*,[158] the Supreme Court explicitly embraced this new positive federal policy by unanimously upholding an Indian hiring preference in the Indian Reorganization Act despite both constitutional and statutory challenges. The Court held that although the Act singled out Native Americans for special protection, it did not violate the equal protection clause.[159] The Court reasoned that the Act was rationally related to the fulfillment of Congress's unique trust obligation to Indian tribes as it was designed to further Indian self-government by making the Bureau of Indian Affairs more responsive to the needs of its tribal constituency.[160]

A. *The Peyote Way Establishment Clause Test*

In subsequent challenges to federal laws and regulations singling out Indians for special protection, courts have consistently followed the *Mancari* decision.[161] For example, in 1991, the Fifth

156. *See supra* notes 60-75 and accompanying text.

157. *See supra* notes 33-48, 51-54 and accompanying text.

158. 417 U.S. 535 (1974).

159. The Fourteenth Amendment provides, in relevant part, that "No State shall deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV §1. Although the Fourteenth Amendment by its own terms applies only to state governments, the Supreme Court has applied the Fourteenth Amendment to the federal government through the Due Process Clause of the Fifth Amendment. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).

160. *Mancari*, 417 U.S. at 552-55.

161. For example, in Moe v. Confederated Salish and Kootenai Tribes of Flathead

Circuit Court of Appeals in *Peyote Way Church of God, Inc. v. Thornburgh*[162] upheld an exemption to federal drug laws for the sacramental use of peyote by members of the Native American Church despite an equal protection clause challenge. In *Peyote Way*, members of the Peyote Way Church of God, a non-Indian church which uses peyote sacramentally, challenged the Native American Church exemption in an attempt to broaden the exemption to cover their own church. The court followed *Mancari*, holding that the exemption did not violate the equal protection clause since it preserved a religion of great importance to many Indian tribes and thus was rationally related to the federal government's fulfillment of its trust responsibility.[163]

The court in *Peyote Way*, using an identical rationale, also rejected the claim that the exemption violated the establishment clause of the First Amendment because it singled out one religion for special treatment. The court extended the *Mancari* standard to its establishment clause analysis because "[t]he federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that same relationship."[164] The court also held that "[t]he unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment."[165] Thus, *Peyote Way* establishes that federal actions, taken to preserve Indian religions which are crucial to continuing tribal identity, do not violate either the equal protection or the establishment clause.[166]

Indian Reservation, the Supreme Court upheld the immunity of reservation Indians from state taxation. 425 U.S. 463, 480 (1976). Also, in Alaska Chapter, Associated Gen. Contractors v. Pierce, the Ninth Circuit Court of Appeals upheld Indian bidding preferences under the Indian Self-Determination Act. 694 F.2d 1162, 1166 (9th Cir. 1982). *See* COHEN, *supra* note 11, at 660-61 ("Laws protecting the separate status of tribal Indians do not violate the principle of equal protection if they are rationally tied to the distinct constitutional status of tribes and to the unique federal-tribal relationship."); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1009-14 (1981).

162. 922 F.2d 1210, 1215 (5th Cir. 1991).

163. *Id.* at 1216.

164. *Id.* at 1217.

165. *Id.*

166. Other federal Circuit Courts of Appeals have disposed of establishment clause challenges to Native American religious exemptions by invoking the *Mancari* "rational relationship" standard. *See* Rupert v. Director, U.S. Fish and Wildlife Service, No. 91-1861 (1st Cir. 1992) (exemption in Eagle Protection Act); United States v. Rush, 738 F.2d 497, 513 (1st Cir. 1984) (peyote exemption); Olsen v. Drug Enforcement Administration, 878 F.2d 1458, 1463 n.5 (D.C. Cir. 1989) (peyote exemption). Another federal Circuit Court of Appeals rejected an establishment clause challenge to the federal peyote exemption by using a

B. *The Peyote Way Establishment Clause Test is Consistent with First Amendment and Federal Indian Law Principles*

Under current Supreme Court doctrine, the government may act to lift governmentally imposed burdens on religious practices without violating the establishment clause because of the influence of the free exercise clause.[167] Similarly, under *Mancari* and its progeny, the government may aid Indian tribes without violating the equal protection clause because of the federal government's trust responsibility to preserve and protect Indian tribes as distinct cultural and political entities.[168] The *Peyote Way* decision correctly relied upon the import of these two constitutional principles in upholding the federal peyote exemption, sensibly recognizing that it would be wholly inconsistent with the free exercise clause and the federal government's trust responsibility to Indian tribes to strike down government action designed to protect a Native American religious group from imminent extinction. Indeed, such action would be tantamount to a governmental policy of "callous indifference" to the interests of a religious group, which has explicitly been forbidden by the Supreme Court.[169]

C. *The Amendment Passes Peyote Way Scrutiny*

The proposed AIRFA amendment, like the challenged exemption for the sacramental use of peyote in *Peyote Way*, is designed to protect traditional Indian religious practices integral to the con-

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Fifth Amendment "substantive due process" establishment clause analysis. Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415, 416-17 (9th Cir. 1972).

167. *See* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987) (holding "alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions" could be a permissible secular purpose); County of Allegheny v. ACLU, 492 U.S. 573, 601 n.51 (1989) ("Government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion."). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-4 (2d ed. 1988):

> In attempting to distinguish between situations where accommodation of programs to religious needs has been held excessive and those where it has been held permissible or even mandatory, it is helpful to posit a dichotomy between governmental actions arguably (even if not beyond doubt) compelled by the free exercise clause, and *governmental actions supportive of religion in ways clearly not mandated by free exercise*. Actions "arguably compelled" by free exercise are not forbidden by the establishment clause.

Id. at 1168 (emphasis added).

168. *See supra* notes 158-60 and accompanying text.

169. Zorach v. Clauson, 343 U.S. 306, 314 (1952). *See* TRIBE, *supra* note 167, at § 14-4 (stating that courts should not use the establishment clause to strike down attempts to protect endangered minority religions, since this would turn the establishment clause into an "awful engine of destruction").

tinued existence of Indian tribes: worship at sacred sites, the sacramental use of peyote, the religious use of eagle parts and feathers, and worship by Native American prisoners. These practices are currently threatened by governmental insensitivity in the wake of the Supreme Court's decisions in *Lyng*, *Smith*, and *O'Lone*. Because the AIRFA amendment is rationally related to the fulfillment of the federal government's historic trust responsibility to Indian tribes, it does not violate the establishment clause under the *Peyote Way* doctrine.

IV. Traditional Establishment Clause Scrutiny

Today's generally accepted establishment clause test was first set out in 1971 in the landmark case of *Lemon v. Kurtzman*.[170] In *Lemon*, the Supreme Court held that a governmental action must have a secular purpose, not have a primary effect that either advances or inhibits religion, and not foster an excessive governmental entanglement with religion.[171] The test remained essentially unchanged until 1989, when the Supreme Court in *County of Allegheny v. ACLU*[172] seemed to alter the *Lemon* test by replacing the second prong of the test with the requirement that the government not convey a "message of endorsement" of religion.[173]

A. The Amendment Should Be Judged By The Lemon Test

The Supreme Court did not apply the *Lemon* test in the 1982 case of *Larson v. Valente*,[174] instead they applied "strict scrutiny" to a Minnesota statute which discriminated against less well established churches.[175] Subsequent cases, however, have limited *Lar-*

170. 403 U.S. 602 (1971).

171. *Id.* at 612-13.

172. 492 U.S. 573 (1989).

173. *Id.* at 595. Five justices of the Supreme Court joined Justice Blackmun's majority opinion which effectively adopted the endorsement analysis by holding that since a nativity scene in a county courthouse conveyed a message of endorsement for religion, it violated the establishment clause. *Id.*

174. 456 U.S. 228, *reh'g denied*, 457 U.S. 1111 (1982).

175. Specifically, the Court reasoned that since the statute exempted only those religious organizations receiving more than 50% of contributions from members from certain registration and reporting requirements, the statute effectively distinguished between well-established churches with strong financial support from their members and new churches lacking constituency or churches which favor public solicitation over reliance on financial support from members. *Id.* at 253-54. In support of this reasoning, the Court cited several statements by Minnesota state legislators which were recorded in the legislative history. Referring to the legislation, one state senator explained that "what you're trying to get at here is the people that are running around airports and running around streets and soliciting people and you're trying to remove them from the exemption that normally applies to religious organizations" while another stated "I'm not sure why we're so hot to regulate the

son's strict scrutiny test to statutes which single out and discriminate against certain religious denominations and have not applied the *Larson* test to laws which merely accommodate religious practices.[176] For example, in *Estate of Thornton v. Caldor*,[177] the Supreme Court applied the *Lemon* test to a law which exclusively benefitted Sabbath observers—Christians and Jews—because the law did not disadvantage faiths which do not observe the Sabbath.[178]

Similarly, the purpose of the AIRFA amendment is not to disadvantage other religions but rather to protect a minority religion which is currently threatened by insensitive governmental actors. Thus, like the statute challenged in *Thornton* which was specifically designed to accommodate Christianity and Judaism but not to discriminate against any other religious groups, the proposed amendment should be judged by the three-part *Lemon* test.

B. The Amendment Passes The Lemon Test

The first prong of the *Lemon* test requires that the proposed amendment have a secular purpose. The AIRFA amendment has at least five important secular purposes. First, because the absence of protective legislation threatens Native American religions with eventual extinction, the amendment protects these threatened minority religions in accordance with the free exercise clause of the First Amendment.[179] Second, the amendment ensures the continued existence of Indian tribes as political entities by removing gov-

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Moonies anyway." *Id.* at 254-55.

176. Several commentators have noted this development. *See, e.g.*, TRIBE, *supra* note 167, at 1192-93 ("Perhaps the *Lemon* test applies to laws that alter the status quo in a way that benefits some religions, as is most frequently the case in establishment clause cases, while *Larson* applies to laws that alter the status quo in a way that burdens some religions."). *See also* Jonathan E. Nuechterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L. J. 1127 (1990):

> Though the Court has not explicitly applied heightened scrutiny to identify religious motivation underlying state decisions to *advantage* religion, it *has* applied "strict scrutiny" to a statute that singled out and discriminated *against* certain unpopular religious denominations [in *Larson v. Valente*]. Such scrutiny identifies a purpose to *disadvantage* (i.e., persecute) those religions, which arguably would also be a violation of the free exercise clause. In the accommodation context, however, there is seldom this question of outright religious persecution. Thus the Court has not applied strict scrutiny to accommodationist laws.

Id. at 1133-34 n.41 (citations omitted).

177. 472 U.S. 703 (1985).

178. *Id.* at 708-10.

179. Generally, governmental accommodation that is compelled by the free exercise clause does not violate the establishment clause since such accommodation has a secular goal. *See supra* note 160 and accompanying text.

ernmentally imposed barriers to the practice of Indian religion in accordance with the federal government's unique trust obligation to Indian tribes.[180] Third, the amendment fosters religious and cultural diversity in our society, which Congress identified as a goal of federal Indian policy when it passed the AIRFA in 1978.[181] Fourth, the prisoners' rights section of the amendment is intended to help rehabilitate prisoners into productive, well-adjusted members of society, which has been recognized as a major goal of the American penal system.[182] Finally, leaving sacred sites located on public land pristine accords with the secular purposes underlying many federal laws concerning historical sites, National Forests, and the environment generally.[183]

The second prong of the original *Lemon* test requires that the amendment not have a primary effect which either advances Indian religions or inhibits other religions.[184] The Supreme Court has held that this prong is not violated by statutes which may "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion."[185] Thus, since the primary effect of the amendment is simply to allow Indian religions to continue to exist by eliminating governmental barriers to worship, the amendment does not run afoul of the second prong of the *Lemon* test. Similarly, even if this prong was indeed modified by the Supreme Court's decision in *Allegheny*,[186] the amendment does not convey a

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180. *See supra* part III(C).

181. "America does not need to violate the religions of her native peoples. There is room for and great value in cultural and religious diversity. We would be the poorer if these American Indian religions disappeared from the earth." H.R. REP. No. 1308, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S.C.C.A.N. 1262, 1264.

182. *See supra* note 135 and accompanying text.

183. Federal statutes have created a public policy in favor of leaving certain public lands untouched. *See, e.g.*, Wilderness Act of 1964, 16 U.S.C. § 1131(a) (1982 & Supp. IV 1986 & 1988); Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470cc(c) (1988); National Historic Preservation Act, 16 U.S.C. §§ 470(f), 470h-2f (1988); National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C) (1988); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1712(f), 1739(e) (1988). Indeed, out of the seven purposes of National Forests identified in the National Forest Management Act of 1976—(1) timber cutting and the preservation of (2) fish habitat, (3) wildlife habitat, (4) outdoor recreation, (5) range, (6) watershed, and (7) wilderness—the only purpose which would be frustrated by the non-destruction of Indian sacred sites is timber cutting. 16 U.S.C. § 1604(e)(1) (1982 & 1988 & Supp. III 1991). This was noted in Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 694 (9th Cir. 1986), *rev'd sub nom*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

184. 403 U.S. 602, 612 (1971).

185. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989). *Texas Monthly* reaffirmed Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987), which held that the the second prong of the *Lemon* test did not prevent government actions to remove governmental burdens from a religious practice.

186. *See supra* notes 172-73 and accompanying text.

message of official governmental endorsement for Indian religions. Rather, the amendment merely conveys a message that a threatened minority religion inextricably bound to the well-being of Indian tribes needs protection from governmental actors.

The third prong of the *Lemon* test requires that the amendment will not excessively entangle the government with Indian religions.[187] The Supreme Court has found excessive entanglement where the statute or regulation in question would create a need for complete governmental regulation, such as in *Lemon*, where the Court believed that an aid program for parochial schools would create the need for comprehensive monitoring by state administrators.[188] Additionally, the Court has struck down legislation because of excessive entanglement where religious bodies have been vested with discretionary governmental powers, as in *Larkin v. Grendel's Den*,[189] where the Massachusetts statute at issue gave churches the power to veto applications for liquor licenses within a 500 foot radius of a church.[190]

The sacred sites section of AIRFA would only entail a small additional amount of consultation and cooperation between agency officials and Native Americans, who already interact on a regular basis due to the requirements of other federal statutes. Indeed, the sacred sites section's requirement that federal land managers give notice to and consult with Indian tribes and religious leaders before beginning federal developments which may adversely affect Indian religious practices pales in comparison to the many other federal statutes which now require notice and consultation with various groups—including Indian tribes and religious leaders—before federal developments may continue.[191] Therefore, since the negligible additional entanglement caused by the sacred sites section does not rise to the level of entanglement struck down in *Lemon* or *Larkin*, this section of the amendment passes the third prong of the *Lemon* test.

The Supreme Court has also held that in certain circumstances, government accommodation of religion can reduce the

187. *Lemon*, 403 U.S. at 613.

188. *Id.* at 622-23.

189. 459 U.S. 116 (1982).

190. *Id.* at 123.

191. *See, e.g.*, Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470cc(c) (1988); National Historic Preservation Act, 16 U.S.C. §§ 470(f), 470h-2f (1988); Federal Cave Resources Protection Act, 16 U.S.C. § 4305 (1988); Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 (1988 & Supp. II 1990); American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1988); National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C) (1988).

amount of pre-existing government entanglement. For example, in *Walz v. Tax Commission*, the Court held that tax exemptions for religious organizations diminished existing governmental entanglement with religion.[192]

Like the tax exemptions in *Walz*, the peyote, eagle feather, and prisoners' rights sections of the proposed amendment would actually reduce the amount of governmental entanglement with Native American religious practitioners. The peyote section, instead of allowing government actors to criminally prosecute the use or possession of the peyote sacrament, removes the sacramental use of peyote from the agenda of law enforcement agencies, thus eliminating present government entanglement. Similarly, the eagle feather section merely establishes a commission to reform the existing governmental procedures used to disburse eagle parts to Native American religious practitioners, thus minimizing unnecessary interference with Native American religious rights. Finally, the prisoners' rights section's extension of religious rights equivalent to those of "mainstream religions" will entail a much smaller degree of discretionary entanglement by prison officials than the present system. Currently, prison officials decide requests for Native American religous exemptions from prison rules on a case by case basis, weighing the goals of the AIRFA—to preserve and protect Indian religions—against penal considerations. Thus, like the sacred sites section of the proposed amendment, the peyote, eagle feather, and prisoners' rights sections do not violate the third prong of the *Lemon* test.

V. Congress Should Pass The Proposed 1993 AIRFA Amendment

The 1993 amendment does not violate the establishment clause when judged by either the *Peyote Way* standard or the traditional *Lemon* test. Under a *Peyote Way* establishment clause analysis, the amendment clearly is constitutional since it is squarely rooted in, and arguably mandated by, the federal government's historic trust responsibility to Indian tribes, since the vitality of Indian communities is so often dependent upon the health of traditional Indian religions. The amendment passes the *Lemon* test because it does not attempt to officially endorse or advance Indian religions. Rather, it provides long-awaited protection for traditional Indian religions that have been continually suppressed by governmental authorities. Furthermore, the amendment recog-

192. 397 U.S. 664 (1970).

nizes that these religions are in dire need of protective legislation, especially after the evisceration of the free exercise clause in *Lyng*, *Smith*, and *O'Lone*.

The suppression of traditional Indian religions began in 1492 when Christopher Columbus "discovered" the New World[193] and has continued for 500 years, ranging from the United States government's outright prohibition of Indian religious practices in the late 19th and early 20th centuries to current government developments which threaten to destroy Indian sacred sites. Indian religion plays such an important role in Indian life that this suppression has caused great damage to Indian tribal societies. Because the proposed 1993 AIRFA amendment represents an attempt to remedy this damage, it finally fulfills the promise of AIRFA in 1978—that the United States government would "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions."[194] Therefore, Congress should pass the amendment as soon as possible. After 500 years of religious intolerance, protection for traditional Native American religions is long overdue.

193. *See* KIRKPATRICK SALE, THE CONQUEST OF PARADISE 97 (1990) (On October 12, 1492, Columbus remarked that the Natives he encountered "would easily be made Christians, because it seemed to me that they had no religion.").

194. 42 U.S.C. § 1996 (1988).